WP(C) 4399/2006
BEFORE
HON'BLE JUSTICE B.K. SHARMA

IN THE GAUHATI HIGH COURT
THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR, TRIPURA, MIZORAM & ARUNACHAL PRADESH

WP(C) No. 4399/2006

1. M/S Banowarilal Agarwalla Pvt. Ltd., represented by Mr. Raktim Acharjee, authorized signatory, FMC Fortuna 3rd Floor, Unit A-7, 234/3A AJC Bose Road, Kolkata-700020.

2. Mr. Raktim Acharjee, son of Sri Kamada Charan Acharjee, resident of Ulubari, Guwahati-7, District-Kamrup, Assam

& Petitioners

- Versus -

1. State of Arunachal Pradesh, represented by the Commissioner & Secretary, Mineral, Development and Trading, Itanagar.

2. Atrunachal Pradesh Mineral Development and Trading Corporation Ltd., A.P.F.C. Building, Chimpu, Itanagar.

3. The Managing Director, Atrunachal Pradesh Mineral Development and Trading Corporation Ltd., A.P.F.C. Building, Chimpu, Itanagar.

4. National Mining Company Ltd. C/o Coal India Limited, North Eastern Coalfields, District-Tnsukia, Assam.

5. Saumya Mining Private Ltd. Tiral Mines, North Eastern Coalfields, District-Tnsukia, Assam.

& Respondents

BEFORE
THE HONBLE MR. JUSTICE B.K. SHARMA

For the petitioners: Mr. J. Roy,
Mr. R.J. Phookan, Advocates

For the respondents: Mr. P.K. Goswami, Sr. Advocate
Mr. S. Sarma, Advocate
Mr. C.K. Sarma Baruah, AG, A.P.
Mr. Bujarbaruah, G.A., A.P.

Dates of hearing & judgment : 06.09.2006.

JUDGMENT AND ORDER (ORAL)

This writ petition is directed against the decision of the respondent corporation holding that the petitioner company is not eligible to participate in the tender process in question.

Shortly stated the facts are as follows.

3. The petitioner No. 1 is a registered company represented by the petitioner No. 2. It is engaged in various contractual works and services with different Government and non-government organizations. The petitioners claim that they are also in the business of open cast coal mine of drilling, blasting, transportation, loading, excavation, which is the subject matter of the tender process involved in this writ petition.

4. The respondent No. 3 has issued Annexure-I tender notice dated 4.8.2006 inviting applications from competent contractors having atleast 10 years of working experience in open cast coal mines doing the work of drilling, blasting, excavation, loading and transporting of OB & coal for the purpose of developing an opencast coal mine within the area specified in the tender notice. Since the conditions of eligibility is the basic issue, the tender notice is quoted below:
\TENDER NOTICE

Application are invited from competent contractors having at least 10 (ten) years of working experience in open cast coal mines doing the work of drilling, blasting, excavation, loading and transporting of OB & Coal for the purpose of developing an opencast coal mine within Namchik-Namphuk coalfields of district Changlang of Arunachal Pradesh { The work includes (a) the production of coal of a quantity of approximately two lakh tonne per annum and (b) the marketing of produced coal on behalf of APMDTCL} fulfilling the following pre-qualification criteria :

1. The contractor should have executed at least one single work of similar nature in their own name of value not less than Rs. 15 crores (Rupees fifteen crores only) during any of the three preceding financial years. However, aggregate turnover of the contractor for the three preceding financial years should not be less than Rs. 40 Crores (Rupees Fourth Crores), for the similar nature of job.
2. The turnover of the contractors should have at least Rs. 18 Crores (Rupees Eighteen Crores only) in any of the three preceding financial years.
3. The contractor should have a minimum financial solvency of Rs. 15 Crores only (Rs. Fifteen crore only).
4. The HEMM used in open cast coal mining should be fully owned by the contractor.

The interested contractors may apply with attested copies of certificates of work done and ownership of equipments etc, to the Managing Director, Arunachal Pradesh Mineral Development & Trading Corporation Limited, APFC building, Chimpu, Itanagar-791113 within twenty one days of the advertisement of this NIT which will be inclusive of the date of advertisement.
Tender papers will be sold to qualified applicants on payment of a bank demand draft of Rs. 12,000.00 (Rupees Twelve Thousand only) per sent, non refundable, in favour of the Managing Director, Arunachal Pradesh Mineral Development and Trading Corporation Ltd. Payable at Itanagar on twenty second and twenty third day of the date of advertisement. Mining operation shall be started only after taking over of possession of the land from Forest Department for coal mining purpose.
The filled-in tender papers form the tenders shall be received by 1400 hrs on fifteenth day from the last day of the sale of the tender document which will be inclusive of the last day of sale.\

5. In response to the tender notice, the petitioner submitted its application for issue of tender documents. Such application was made on 20.8.2006 enclosing therewith the following documents as a proof of their eligibility.

(1) Annexure-1: Memorandum of articles and power of attorney
(2) Annexure-2: Ten years experience certificate
(3) Annexure-3: Certificate of single work of value more than Rs. 15 crores.
(4) Annexure-4: Certificate of aggregate turn over more than Rs. 40 crores.

(5) Annexure-5: Certificate of turnover more than Rs. 18 crores in every last 3 years.
(6) Annexure-6: Certificate of financial solvency more than Rs. 15 crore.
(7) Annexure-7 :Certificate of ownership of HEMM equipments used.

6. It was indicated in the letter that the company would welcome all clarifications regarding their work and that they could submit any document required.

7. Altogether 7 applicants including the petitioner and the respondents No. 4 and 5 were in the fray out of which only respondents No. 4 and 5 have been found to be eligible in terms of the tender notice to get tender papers. The petitioners are aggrieved by the notice dated 25.8.2006 by which it has been notified that out of the 7 applicants, it is only the respondents No. 4 and 5, who are found to be eligible in terms of the tender notice, to get tender papers.

8. According to the petitioner company, they have been eliminated from the race at the very threshold in a most arbitrary and illegal manner with the sole purpose of favouring only a few. It is the case of the petitioner that for a proper competition, the tender documents ought to have been supplied to them. They have further asserted that they fulfill the conditions stipulated in the tender notice and thus there is no question of finding them ineligible unless there is arbitrary exercise of power.

9. The writ petition was moved on 4.9.2006 and the respondent corporation having entered appearance alongwith the records, the learned counsel representing it was requested to allow perusal of the records by the learned counsel for the petitioner to which he readily agreed. The matter was adjourned till today enabling the petitioner to file additional affidavit on the basis of the records. Accordingly, the petitioners have filed the additional affidavit.

10. I have heard Mr. J. Roy alongwith Mr. RJ Phookan, learned counsel for the petitioners and Mr. PK Goswami, learned Sr. Counsel assisted by Mr. S. Sarma, appearing for the respondent corporation. I have also heard Mr. CK Sarma Baruah learned Advocate General, A.P. assisted by Mr. Bujarbarua, learned State Counsel representing the State respondents.

11. The basic thrust of argument of Mr. Roy, learned counsel for the petitioner is that the corporation in case of any doubt regarding eligibility of the petitioner company, could have asked for clarification as was volunteered in the application itself. He submitted that if the strict application of the clauses of eligibility is made, then in that case none of the tenderers can be said to be eligible for the works and for that matter the tender documents. Placing reliance on the decision of this Court in WP(C) No. 1454/2004 (M/s. North Eastern Trade International Vs. HPC Ltd. & Ors.) rendered on 8.4.2004, learned counsel contended that the rigor in which the eligibility criteria have been evaluated has minimized the competition and unnecessary elimination at the very threshold, which the corporation, otherwise would have been entitled after submission of tenders.

12. Mr. PK Goswami, learned Sr. Counsel for the corporation referring to the entire records of the case including the applications and the annexures thereto submitted by the writ petitioner as well as the private respondents submits that there is nothing wrong in the impugned decision, when the petitioner admittedly does not fulfill the requirements as stipulated in the tender notice. He submits that as per the own showing of the petitioner it does not fulfill the requirement of clause-1 of the tender notice. Referring to the additional affidavit filed by the petitioner, he also submits that even as per the additional affidavit, the petitioner does not fulfill the pre-conditions of eligibility. He has placed reliance on the decision of the Apex Court as reported in (1996) 10 SCC 760 (Shapers Construction (P) Ltd. Vs. Airport Authority of India).

13. Mr. CK Sarma Baruah, learned Advocate General, Arunachal Pradesh submits that when admittedly, the petitioner does not fulfill the conditions of eligibility, there is no question of supplying the tender forms and any leeway, in case shown to the petitioner company will be misplaced opening the floodgate for others to approach the Court which eventually will have telling effect on the project and for that matter the financial growth of the State.

14. I have considered the submissions made by the learned counsel for the parties at length. I have also gone through the records as has been produced by the learned counsel for the corporation. The records contain the statements prepared by the authorities of the corporation incorporating the datas furnished by the respective applicants. Prima facie it appears that the authorities of the corporation meticulously evaluated the applications and the enclosures thereof submitted by the 7 applicants. In the statement, it has been indicated as to whether the particular applicant fulfills the eligibility criteria under different heads. On perusal of the statement, it appears that out of the 7 applicants only the respondents No. 4 and 5 have been found to be eligible to participate in the tender process.

15. Independent of the above exercise carried out by the expert body, I have also verified the documents submitted by the petitioner alongwith their application vis- -vis the application submitted by the said two respondents. While according to the petitioner the independent and ancillary works like transportation etc. do fulfill the requisite condition of atleast 10 years working experience in opencast coal mines, but it is the case of the corporation that the requirement and the whole emphasis is the 10 years working experience in opencast coal mines with the works of drilling, blasting, excavation, loading and transporting of OB and coal, which is required for the purpose of developing an opencast coal mine in the area specified in the tender notice. As per the statements prepared by the corporation, the petitioner company lacks in atleast 10 years experience in the area. It has been specified in the statement that although the certificates annexed to the application do certify carrying out works of rock excavation, dumps removal and transportation, loading and transporting etc. but it does not fulfill the requirement of atleast 10 years experience in opencast coal mining. On the basis of the calculation the total experience of the petitioner in the field has been found to be 4 years 6 months as against the requirement of atleast 10 years.

16. As against the above position of the petitioner, it has been found that the respondents No. 4 and 5 are having experience of opencast coal mining for 11 years and 11 years 7 months respectively. Other applicants have also been found to be lacking in the experience. Neither in the writ petition, nor in the in the additional affidavit, the petitioner has given the details of required 10 years experience. In the writ petition, apart form the statement in paragraph 10 regarding fulfillment of the criteria of financial involvements, the petitioner has not stated anything about the basic requirement of having atleast 10 years of working experience in opencast coal mines. In the additional affidavit also, which has been filed after perusal of the records produced by the corporation and knowing fully well as to on what count the petitioner company has been found to be not qualified, the petitioner in paragraph 4 although has given the particulars of the works executed, but the same also do not fulfill the basic requirement of 10 years experience. Even if the items mentioned in paragraph 4 (I) to (VI) are taken together then also the petitioner by far short of the basic requirement of 10 years experience at the minimum.

17. So far as the items mentioned in paragraph 4, (VII) and (VIII) are concerned, they are all relating to the periods which are 6 years and 7 years commencing from 5.8.2005 and 14.8.2005 and are only in the realm of offing and the periods of work although have commenced are far off the completion. However, even if the works so far undertaking and/or the periods so far have gone by are also ta

ken into account, then also the petitioner company does not fulfill the basic requirement. On perusal of the records, it has transpired that the respondent corporation has duly taken note of the works mentioned by the petitioners towards fulfillment of the basic requirement and upon scrutiny of the same, it has been found that the petitioner company by far lacks the said requirement. In fact as per the statement prepared, as against the minimum requirement of 10 years of experience, the petitioner company has only 4 years 6 months of experience in opencast coal mining.

18. In the decision on which Mr. Goswami, learned Sr. Counsel for the petitioner has placed reliance i.e. Shapers Construction (supra), the Apex Court under somewhat similar circumstance held that since the petitioner therein did not fulfill the pre-condition for giving tender form, there was no illegality in respondents not giving the tender form.

19. There is another aspect of the matter. Although the corporation has not rejected the application of the petitioner on that count, but records have revealed that the petitioner company has also not indicated about fulfillment of condition No. 1 which is execution of atleast one single work of similar nature by a tenderer in its own name of value not less than Rs. 15 crores during any of the 3 preceding financial years with aggregate turn over of Rs. 40 crores. The petitioner although has stated about aggregate turn over of Rs. 40 crores in preceding 3 years, but has not stated anything nor the records have revealed about execution of atleast one single work of similar nature in its own name of value not less than 15 crores during any of the 3 preceding financial years. In paragraph 10 of the writ petition, while giving particulars of the works executed and its financial involvement, although, the petitioners have stated about fulfillment of requirement of aggregate turnover of Rs. 40 crores, but has not stated anything as to the execution of atleast one single work of similar nature worth Rs. 15 crores in any of the 3 preceding years. In the additional affidavit also the petitioner has not stated anything in this regard. However, the petitioner has not been eliminated on this count, which otherwise could have been a relevant factor.

20. From the above revelations made as per the own showing of the petitioner as well as from the records, when the petitioner company does not have basic requirement of 10 years experience in the field of operation i.e. opencast coal mines, doing the works involved therein as indicated in the tender notice, there is no question of supplying them tender form. Even in the additional affidavit, which has been filed after perusal of the records and knowing the reasons for elimination of the petitioner, they could not highlight anything as to how they fulfill the said basic requirement. This being the position the argument advanced by the learned counsel for the petitioners that as per their undertaking in their application, for any clarification and submission of further documents, they ought to have been given a chance before elimination, also falls through.

21. The decision on which learned counsel for the petitioner has placed reliance i.e. M/s. North Eastern Trade International (supra) does not have any application to the facts and circumstances involved in this case.

22. In view of the above, I do not find any merit in the writ petition and accordingly it is dismissed, without, however, any order as to costs.

JUDGE

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